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Supreme Court, U.S.
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No. 92-2026

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

VISTA PAINT CORPORATION,
Petitioner,
v.

UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY, AIR RESOURCES BOARD, SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, SAN DIEGO AIR POLLUTION CONTROL DISTRICT,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases	Page
Bowman v. Loperena, 311 U.S. 262 (1940)	4
Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991)	4
Missouri v. Jenkins, 495 U.S. 33 (1990)	3
Pfister v. Finance Corp., 317 U.S. 144 (1942)	4
U.S. v. Aguilar-Correa, 953 F.2d 558 (9th Cir. 1992)	2
Federal Rules	
Federal Rules of Appellate Procedure	
Rule 25(a)	2, 3
Rule 40(a)	2
Rule 40(b)	2, 3
Rules of the United States Court of Appeals for the Ninth Circuit	
Rule 31-2	2, 3

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Petitioner Vista Paint Corporation hereby replies to arguments first raised in the brief in opposition to certiorari.

Respondents United States of America and Environmental Protection Agency argue in opposition solely that Vista's petition for rehearing in the Ninth Circuit was filed "out of time" and "untimely" and that, therefore, the pendency of that petition in that court did not enlarge the time for filing a petition for certiorari in this Court.[1]

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[1] The other three respondents by letters filed in advance of the government's opposition waived the filing of any formal opposition but purported to concur in the government's anticipated filing.

The government's argument is based on the following factual assertion and record citation: "Petitioner filed a petition for rehearing on October 13, 1992, beyond the 14 days allowed by Fed. R. App. P. 40(a). C.A. Record, 10/13/92 Entry."

The government's factual premise is incorrect and its apparent legal assumptions are erroneous. Vista's petition for rehearing was timely filed in the Ninth Circuit on October 8, 1992.

Rule 40(a) of the Federal Rules of Appellate Procedure provides, in relevant part, that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is . . . enlarged . . . by local rule." Rule 40(b) thereof provides that a petition for rehearing shall be in a form, and copies shall be served and filed, as prescribed by the federal rules relating to briefs. Rule 25(a) thereof provides, in relevant part, that ". . . briefs . . . shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail . . . is utilized." Ninth Circuit Rule 31-2 "relat[es] to time for service and filing of briefs." *U.S. v. Aguilar-Correa,* 953 F.2d 558, 559 (9th Cir. 1992). Rule 31-2 includes Rule 31-2.1(c), which provides: "In all cases, first class mail shall be deemed to be the most expeditious form of delivery by mail. (See FRAP 25(a).)" A petition for rehearing is a "brief" within the meaning of Rule 31-2. *Aguilar-Correa*, 953 F.2d at 559. A requirement of Rule 31-2 ". . . applies as much to a brief petitioning for rehearing as to any other brief." *Id.*

The government acknowledges that the filing of its own petition for rehearing, allegedly on October 8, 1992, was "timely." Vista's petition for rehearing was deemed filed on the same day. Vista deposited in first class mail on October 8, 1992 its petition under cover of a letter of its counsel, dated October 8, 1992, stating that Vista's petition for rehearing was "[e]nclosed for filing." (See

letter from Elizabeth Kauffman to Clerk, United States Court of Appeals, Ninth Circuit, dated October 8, 1992, lodged with the Clerk of the Court.) The proof of service by mail attached to Vista's petition declared, under penalty of perjury, in relevant part, as follows:

> "PETITIONER claims the privilege of Rule 25(a), Federal Rules of Appellate Procedure: '. . . briefs shall be deemed filed on day of mailing if the most expeditious form of delivery by mail . . . is utilized'; Ninth Circuit Rule 31-2.1(c): '. . . first class mail shall be deemed to be the most expeditious form of delivery by mail'; Rule 40(b), Federal Rules of Appellate Procedure: '. . . copies [of the Petition] shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs.'" C.A. Record, 10/13/92 Entry.[2]

The entry on the Ninth Circuit's docket on which the government relies specifically noted that Vista's petition had been "served on 10/8/92." The Ninth Circuit, itself, deems Vista's petition to have been filed timely on October 8, 1992. (See letter from Senior Deputy Clerk of the United States Court of Appeals for the Ninth Circuit to Christopher G. Foster, Esq., dated August 12, 1993, lodged with the Clerk of the Court, which states, in part "[i]n summation, your petition was timely filed under the rules and procedures as applied by this court.")[3]

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[2] The government conceded the timely filing of Vista's petition in a letter to the Ninth Circuit dated March 2, 1993 in which it stated "[o]n September [sic] 7 and 8, 1992, the appellant and appellee filed petitions for rehearing from this Court's unpublished decision in the above-referenced case." This statement not only admits the timeliness of Vista's petition but also demonstrates the government's adoption of the provisions of Rule 25(a) of the Federal Rules of Appellate Procedure with respect to the filing of its own petition. C.A. Record, 3/16/93 Entry.

[3] This Court defers to the Circuit Courts in matters relating to interpretation and treatment of petitions for rehearing filed therein. *Missouri v. Jenkins*, 495 U.S. 33, 46-50 (1990).

Accordingly, Vista's petition was filed timely on October 8, 1992 under the above rules.[4]

For these reasons, Vista's petition for rehearing in the court below and petition for certiorari here were timely and, for the reasons set forth in Vista's petition for certiorari, which is otherwise unopposed, certiorari should be granted.

Respectfully submitted,

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Dated: August 13, 1993.

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[4] Even if the petition for rehearing had been filed late in the Ninth Circuit, it may still have tolled the time period applicable herein. In *Bowman v. Loperena*, 311 U.S. 262, 266 (1940), a case cited by the government, the Court stated that "where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." The government cites *Pfister v. Finance Corp.*, 317 U.S. 144, 150 (1942), however, for the proposition that an out-of-time petition for rehearing, where the original order is not reexamined, does not enlarge the time for review of the original order. The government goes on to state, without any citation, that "[n]othing in the court's order suggests that the court did more than determine that the petition failed to set forth grounds for reexamination of the original order." But there is nothing in the Ninth Circuit's denial of Vista's petition for rehearing that suggests that the court did not reexamine the original order in reaching its conclusion to deny the petition. *Cf., Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) ("[A] summary denial of rehearing en banc is insufficient to confer any implication or inference regarding the court's opinion relative to the merits of a case.").